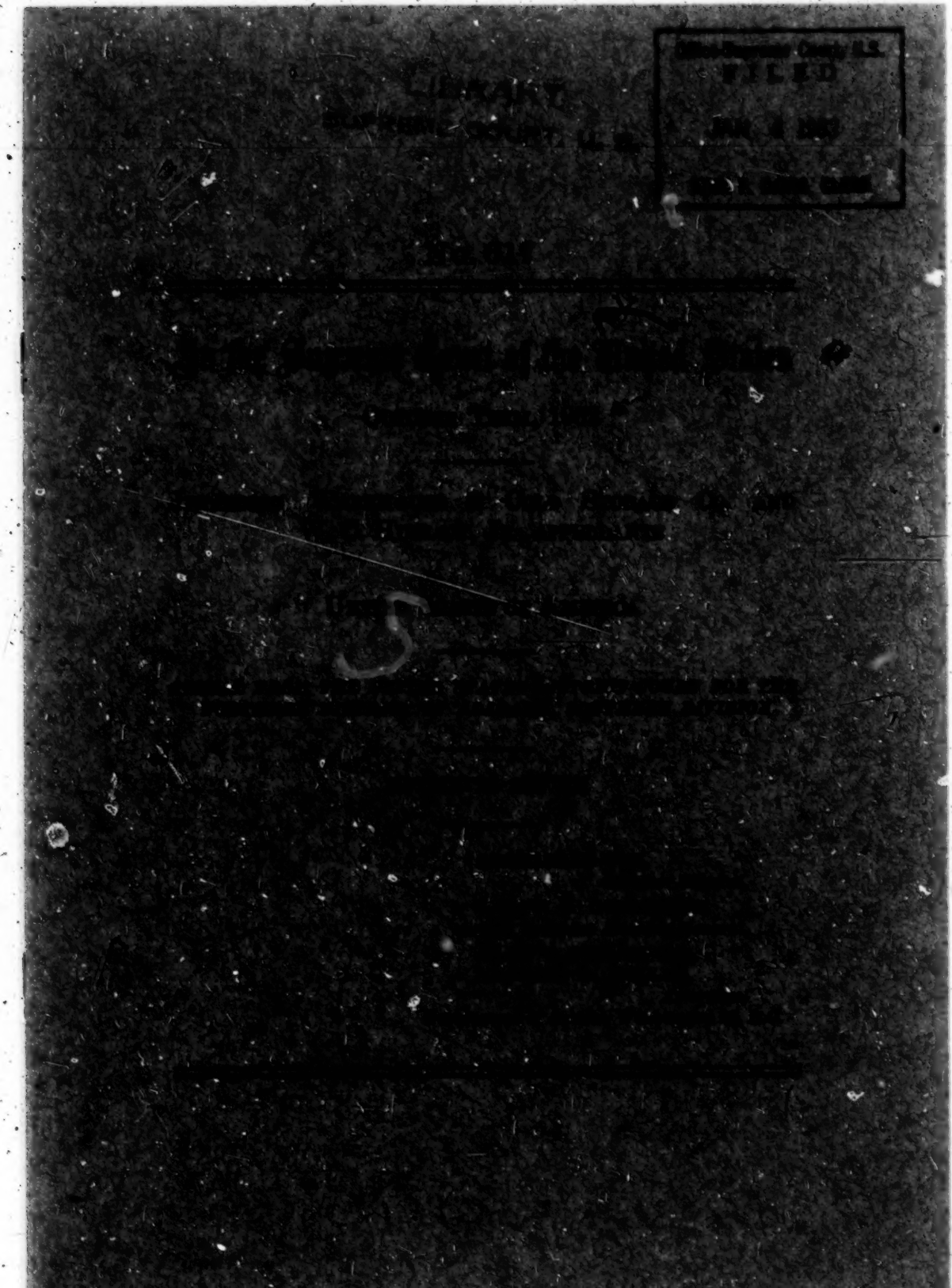

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 617

JEFFERSON WAREHOUSE & COLD STORAGE CO. AND W. C. HUDLOW, JR., APPELLANTS

v.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the United States moves that, insofar as it pertains to these appellants,[1] the judgment of the United States District Court for the Northern District of Alabama be affirmed.

OPINION BELOW

The June 8, 1962, opinion and order of the district court is reported at 205 F. Supp. 640. The orders of July 31, 1962, amending the judgment of June 8, 1962, are not reported.[2]

[1] See pp. 3, 6, n. 6, *infra*.

[2] The June 8, 1962, opinion and order and the July 31, 1962, orders are not printed in the Appendix to the Jurisdictional

JURISDICTION

This action was brought by the United States under Sections 1–3 of the Elkins Act, and Section 20(9) of the Interstate Commerce Act, *infra*, pp. 10–12, 14, at the instance of the Interstate Commerce Commission, to protect the Commission's jurisdiction in a related proceeding then pending. On June 8, 1962, the court issued a final decree. On July 31, 1962, the decree was amended (J.S. App. No. 425, pp. 17–34). Notice of appeal was filed on September 27, 1962. The jurisdictional statement was filed on November 26, 1962. The jurisdiction of this Court rests upon 49 U.S.C. 45.

QUESTION PRESENTED

Whether the district court, in the exercise of the equitable jurisdiction conferred upon it by Section 3 of the Elkins Act, abused its discretion by requiring appellants to pay certain rentals that had been fixed by the Interstate Commerce Commission for a railroad-owned terminal facility of which they were tenants, as of the date the Commission's order became effective.

STATUTES INVOLVED

The relevant provisions of the Elkins Act, 32 Stat. 847, as amended, 49 U.S.C. 41–43, and the Interstate Commerce Act, 24 Stat. 379–386, as amended, 49 U.S.C. 1 *et seq.*, are set forth in the Appendix, *infra*, pp. 10–14.

Statement. They do, appear, however, as Appendices to the Jurisdictional Statement filed in No. 425, this Term, *Birmingham Ice & Cold Storage Co.* v. *Southern Ry. Co.* (hereafter J.S. App. No. 425).

STATEMENT

This appeal by the Jefferson Warehouse & Cold Storage Company and W. C. Hudlow, Jr., is from the same order of the district court which is now before this Court on an appeal taken by two other parties, Birmingham Ice & Cold Storage Company and Shaw Warehouse Company, No. 425, this Term. The United States has filed previously a memorandum in response to the Jurisdictional Statement filed in No. 425. This motion to affirm is directed solely to the appeal in No. 617. The background of the litigation may be summarized as follows:

On July 25, 1957, the Shaw Warehouse Company filed a complaint with the Interstate Commerce Commission against the Southern Railway Company. The complaint charged that the railroad was engaging in discriminatory and unlawful rental practices in the operation of the Birmingham Food Terminal, a commodity terminal which was owned and operated by the carrier.

On July 18, 1958, this suit was instituted by the United States, at the instance of the Commission, to protect the Commission's jurisdiction in the administrative proceeding then pending. The government's complaint sought an injunction against the railroad and the tenants of the terminal, to restrain them from violating the Elkins Act[3] and the Interstate Commerce Act[4] by the renting of facilities at the terminal for less than fair market rentals, by the sale of such facilities at less than fair market value or

[3] 32 Stat. 847, as amended 49 U.S.C. 41–43.

[4] 24 Stat. 286, as amended, 49 U.S.C. 20(9).

by the extension of credit or any other advantage by the railroad to the tenants.

On October 6, 1959, the Commission issued its decision in the administrative proceeding, *Shaw Warehouse Co.* v. *Southern Railway Co.*, 308 I.C.C. 609, affirmed, 186 F. Supp. 29 (N.D. Ala. 1960). It found that the railroad had violated the Interstate Commerce Act by failing to include certain necessary elements in computing its rental charges (such as development costs and the availability of expansion areas); it ordered the railroad to cease and desist from such unlawful rental practices and to file an affidavit of compliance by a date eventually extended to September 1, 1960. On that date, the railroad filed such an affidavit, setting forth an increased rental schedule in purported compliance with the Commission's order.

On May 5, 1961, appellants in No. 425, the Birmingham Ice & Cold Storage Company and the Shaw Warehouse Company sought to intervene in the government's suit against the railroad and its tenants, as parties plaintiff and to add as defendants to the suit, *inter alia*, the Jefferson Warehouse and Cold Storage Co., and W. C. Hudlow, Jr., appellants herein. The complaint in intervention joined in the prayers of the complaint of the United States for relief and, in addition, sought other relief, including a determination that the Jefferson Company and Hudlow were liable for rents owed by certain predecessor tenants. Intervention was granted on June 2, 1961.

On October 12, 1961, the United States was granted leave to file an amended complaint, for the purpose

of adding the Jefferson Company and Hudlow as parties defendant as well as to request an order compelling the tenants to pay the difference between the rentals they had actually been paying and those set forth in the railroad's affidavit of compliance from and after August 1, 1957,[5] or at least from and after September 1, 1960.

On June 8, 1962, the court issued its memorandum opinion and decree (J.S. App. No. 425, pp. 17–32), in which, on the basis of the Commission's order, it fixed the minimum monthly rental and minimum sales price for each of the facilities in the terminal; enjoined the railroad and the tenants from paying or receiving less than the fixed sales prices or rentals; and forbade the railroad to advance or pledge credit for the purchase of the facilities. The court ordered certain of the tenants, including the Jefferson Company and Hudlow, to pay the fixed rentals from and after September 1, 1960. As to other tenants, however, the court found, in the exercise of its discretion, that the equities did not require payment of the higher rates retroactively and, accordingly, ordered them to pay the fixed rentals from and after May 1, 1962.

Motions to alter and amend the opinion and decree of the district court were filed by the railroad and by appellants. On July 31, 1962, the court issued an order, denying the motion of appellants and granting in part the motion of the railroad (J.S. App. No. 425, pp. 33–34).

---

[5] The date on which the premises were completed.

ARGUMENT

Appellants seek review by this Court of the decree entered by the district court to implement the determination of the Interstate Commerce Commission that the Southern Railway Company had engaged in discriminatory and unlawful rental practices in connection with the operation of its Birmingham Food Terminal. The decree was rendered pursuant to the jurisdiction conferred upon the court by the Elkins Act to "enforce an observance of the published tariffs" and to "direct and require a discontinuance of * * * discrimination." 32 Stat. 847, as amended, 49 U.S.C. 43. Exercising the discretion called for by the equitable nature of its jurisdiction, the court directed that appellants, tenants of the terminal, pay the new minimum rentals fixed in accordance with the Commission order from the date that those new rentals became effective. Contrary to appellants' contentions this directive did not constitute an abuse of discretion but, for the reasons assigned by the court, was appropriate in the circumstances. Moreover, we submit that the matter is not one which would warrant plenary consideration by this Court.[6]

1. There is no merit to appellants' claim that the district court discriminated against them by requiring them to pay the new minimum rentals retroactive to the date those rentals were established by the railroad pursuant to the Commission order, while providing that certain other tenants need pay the rentals pros-

[6] With respect to the appeal in No. 425, this Term, the United States adheres to the views expressed in its memorandum in response to the Jurisdictional Statement filed on that appeal.

pectively only. As the court's opinion reflects, the distinction drawn between the group of tenants including appellants and the other tenants followed a careful consideration of the equities, with due regard to the differences in the situations of the various tenants. Specifically, the court took cognizance of the fact that some tenants, including appellants, had first entered into rental arrangements *after* the railroad's practices were under investigation and the government's suit had been filed, with full knowledge of the fact that the rentals were being attacked as discriminatory and unlawful. In contrast, the tenants required to pay the new rentals prospectively only had arrangements with the railroad which preceded the challenge to the rentals provided in those arrangements; and their claims with respect to cost allocation, shipper status and statutory coverage were determined only after a full trial and the resolution of many complex valuation problems.

What appellants overlook in asserting discrimination is that the requirement of uniformity is satisfied by a proper classification under which all persons similarly situated are accorded like treatment. *Fernandez* v. *Wiener*, 326 U.S. 340, 359–360; *Patton* v. *Brady*, 184 U.S. 608, 622–623; *Nicol* v. *Ames*, 173 U.S. 509, 521. There is, of course, no claim here that different treatment was given persons in the same situation. Nor can it be seriously urged that the classifications established by the court—*viz.*, those tenants whose rental arrangements antedated the Commission inquiry into the railroad's practices and those whose arrangements did not—were arbitrary.

2. Appellants appear to question certain findings of the district court and also endeavor to raise an issue concerning the court's purported failure to make other findings (J.S. 5–7). They point to no evidence, however, to support these attacks upon the court's findings, which, we submit, have an ample evidentiary foundation. Rather, their main complaint is that they were denied their day in court (J.S. 12).

This claim is wholly without basis. By their own admission (J.S. 12), appellants became parties to the proceedings below on June 2, 1961. The trial did not commence, however, until April 23, 1962—over ten months thereafter. It lasted until May 2, 1962, during which period the court received a "mass of documentary evidence and oral testimony" (J.S. App. No. 425, p. 17). It is thus apparent that appellants had ample opportunity to introduce any relevant, material evidence, and it is noteworthy that there is no claim that any evidence which was offered to support their position was excluded by the district court.

Moreover, since appellants' tenancy started in August 1958, and the Interstate Commerce Commission proceeding terminated in October 1959, it would appear that there was adequate opportunity for them to present their contentions to the Commission. Their failure to do so evidences a lack of diligence or interest on their part.

3. Appellants' other contentions are similarly lacking in substance. It is irrelevant that appellant Hudlow had "no closer connection with transportation than merely being the sole stockholder and

president of [the Jefferson Company]" (J.S. 11–12); or that the company's rental arrangement took the form of a negotiated contract with the railroad. Neither the use of the corporate form or of a contractual arrangement can shield a practice or scheme which results in a rebate or discrimination in the transportation of property. See *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, 255; 145 Fed. 1007 (C.C.E.D. Wis.); *Chicago M. & St. P. Ry.* v. *Minn. Civic Ass'n*, 247 U.S. 490, 498, 501; *Metropolitan Holding Co.* v. *Snyder*, 79 F. 2d 263, 266 (C.A. 8); *Chicago B. & Q. R. Co.* v. *Blunk*, 101 F. Supp. 219 (S.D. Iowa); *Southern Ry. Co.* v. *White*, 284 Fed. 560, 562 (C.A. 6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

ARCHIBALD COX,
Solicitor General.
JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.
ALAN S. ROSENTHAL,
PAULINE B. HELLER,
Attorneys.

JANUARY 1963.

APPENDIX

The Elkins Act, 32 Stat. 847, as amended, 49 U.S.C. 41–43, provides in pertinent part:

> §1. Liability of corporation carriers and agents; offenses and penalties.
>
> (1) Liability of corporation common carriers; offenses; penalties; jurisdiction.
>
> * * * The willful failure upon the part of any carrier, subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, * * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor * * *.
>
> * * * * *
>
> §2. Parties included in proceedings to enforce law.
>
> In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceeding be instituted before the Interstate Commerce Com-

mission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

§3. Proceedings in equity to enforce tariffs, etc., United States attorneys; damages; witnesses; precedence.

Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction, and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well

against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several United States attorneys, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 1, 2, or 3 of this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by chapter 1 of this title. * * *

* * * * * * *

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1, *et seq.*, provides in pertinent part:

* * * * * *

§ 2. Special rates and rebates prohibited.

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

§ 3. Preferences; interchange of traffic; terminal facilities.

(1) Undue preferences or prejudices prohibited.

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

§6. Schedules and statements of rates, etc., joint rail and water transportation.

* * * * *

(7) Transportation without filing and publishing rates forbidden; rebates; privileges.

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any de-

vice any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * *

§20. Reports, records, and accounts of carriers; mandamus; liability of initial carrier for loss, etc.—

* * * * *

(9) Jurisdiction to compel compliance by mandamus.

The district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter or of any statutes supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this chapter and said statutes, or any of them.

* * * * *